

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

vs.

ALTON COLES a/k/a NASEEM COLES,
et al.,

Defendant.

Philadelphia, PA
CR-05-440

21208 March 3, 2008

MICHAEL J. BRESNICK, Clerk
By MA Dep. Clerk

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE R. BARCLAY SURRICK
UNITED STATES DISTRICT COURT JUDGE

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(Court in Session)

THE CLERK: ...R. Barclay Surrick presiding.

THE COURT: Good morning. Have a seat.

COUNSEL: Good morning, Judge.

MR. WARREN: Good morning, Judge.

MR. LLORET: Good morning, Your Honor.

THE COURT: All right. Counsel, on Friday after we recessed, I received a supplemental objection to instructions from Mr. McMahon.

MS. CHERNIACK: That's correct, Your Honor.

THE COURT: All right. I want to deal with at this point. First of all, you have requested that I instruct the jury that each individual defendant must be found guilty of each individual element of the crime. I have already instructed the jury in that regard. I don't know that it's necessary at this juncture to repeat that instruction.

MS. CHERNIACK: Your Honor, I was just asking for a more straightforward, simple instruction. I think it was in there, but it was combined with the other elements of your response. So that's why we requested a clarification instruction on that.

THE COURT: I think I specifically requested at the end of Friday after I talked to the jury that they -- if they had any concern about the answer that I had given, the instruction I had given, that they should communicate with the

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1 Court and we would attempt to clarify the situation. I think
2 we have not heard anything. Evidently, the instruction must
3 have satisfied their needs.

4 I don't intend to go back and tell them again that
5 the defendants need -- the Government needs to prove each
6 element against each defendant. It's already been said.

7 You have also requested that I tell the jury that the
8 defendants must have been directly managed, organized, or
9 supervised. You haven't cited any authority for that, and
10 quite frankly, all the law that I've been able to find seems to
11 go in the other direction.

12 MS. CHERNIACK: Your Honor, Mr. McMahon did cite a
13 case previously in this case, United States v. Echevarria, I
14 believe, at the end of the trial, and the reason I asked for
15 this instruction is that I believe that it's correct in that
16 when we talk about a corrupt organization, the jury must find
17 that the individual managed -- had an agreement between five or
18 others to manage, organize, or supervise. I don't think it's
19 sufficient. I know that the Government cited an example of Ray
20 Crock (phonetic) and McDonalds and that just having Ray Crock
21 as the head was sufficient enough to have an organization, but
22 the law seems to indicate and in Echevarria, it's very clear
23 that even if a defendant hires three people and then the three
24 people go out and hire more people under them, that's not
25 sufficient to prove a corrupt organization. There has to be an

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1 agreement between all the individuals that they're -- that the
2 defendant is the head of that organization.

3 THE COURT: Well, that is the next request that you
4 made, that I tell the jury that also. Mr. Lloret, do you have
5 anything you want to say at this juncture, or Mr. Bresnick.

6 MR. LLORET: Bresnick, Your Honor.

7 MR. BRESNICK: Yeah. Your Honor, it's been -- been a
8 couple of weeks since I read that case, Echevarria, but it has
9 nothing to do with what is at issue here. As I recall,
10 Your Honor, the issue there was whether the Court needed to
11 provide a special interrogatory with respect to unanimity of
12 the -- the various acts, the criminal acts that the defendant
13 and others needed to have committed, but it has nothing to --
14 to do with the issue here, Your Honor.

15 THE COURT: All right. Well, any -- any other
16 comment? All right. I'm going to deny the request. I think
17 that, frankly, the law -- they do not state the law as it
18 presently exists in this circuit, and I think the jury has been
19 adequately instructed with regard to the crime of a continuing
20 criminal enterprise.

21 If they come back with any questions, we will talk
22 about them, and we will address them, but at this juncture, the
23 requests that you have made are denied. All right?

24 MS. CHERNIACK: Thank you, Your Honor.

25 MR. LLORET: Very well, Your Honor.

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1 THE COURT: Counsel, anything else?

2 MR. WARREN: No, sir.

3 MR. LLORET: Nothing further.

4 THE COURT: All right.

5 (Recess)

6 THE COURT: ...continue to deliberate and see whether
7 they can't resolve their differences, and then we will see
8 where it goes from there.

9 The note itself seems to indicate that they have
10 agreed on all but these two counts, and I'm going to indicate
11 to them that I'm assuming that that's what they have said, and
12 if that's not correct, that they should let me know so that we
13 have some sense of whether this is just one --

14 COUNSEL: I don't have a problem with that,
15 Your Honor.

16 THE COURT: Any problems?

17 COUNSEL: No, Your Honor.

18 MR. LLORET: No objection, Your Honor.

19 COUNSEL: I'm good.

20 MR. HARMELIN: Well, I hate to be a stick in the mud.
21 I was just wondering whether it was possible for them, if they
22 are deadlocked on these two, for them to give a verdict as to
23 the other 98 counts.

24 THE COURT: Well, it is possible for them to do that,
25 but I think at this juncture, we'll let them go back and see

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1 whether they can resolve the impasse here, and if they can't,
2 then we'll consider that approach.

3 MR. HARMELIN: Thank you, Your Honor.

4 THE COURT: Okay. All right, Mr. Finney.

5 | (Pause)

6 MR. WARREN: Your Honor, can we bring the defendants
7 in?

8 MR. FINNEY: IS that all right, Your Honor?

9 MR. WARREN: Yeah. Yeah.

10 THE COURT: Yes.

11 MR. WARREN: Go. Go.

12 THE COURT: Stop him. I think this trial has been
13 too long for Mr. Finney.

14 MR. LLORET: He's anxious, Your Honor, anxious to
15 move it along. Next he'll dispense with the attorneys too and
16 really move it along.

17 MR. WARREN: Without objection, Judge.

18 MR. LLORET: Your Honor -- is Your Honor intention to
19 give the charge under Fiovoranti, the Third Circuit sort of
20 modified Allen charge or --

21 THE COURT: That's what I essentially intend to do.
22 Yeah.

23 MR. LLORET: Thank you, Your Honor.

24 MR. WARREN: That's fine, Judge. Which you already
25 charged them on already, by the way, but --

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1 MR. LLORET: Yeah. It's in the -- it's in the
2 beginning instruction.

3 MR. WARREN: Yeah.

4 (Pause)

5 THE CLERK: Please rise.

6 THE COURT: Okay. Have a seat, ladies and gentlemen.
7
8
9
0 Ladies and gentlemen, you sent me a note which indicates that
you are unable to reach a verdict on Count 79 and Count 80. I
assume based upon that note that you have reached agreement on
the other counts. If that is not so, please let me know.

11 | Okay?

12 Ladies and gentlemen, you've worked long and you've
13 worked hard on this case. I'm going to ask you to work a
14 little while longer.

15 When you go out, I'm going to send you back out and
16 ask you to continue your deliberation, and when you go out,
17 ladies and gentlemen, you have a duty to consult with each
18 other with a view towards reaching an agreement if it can be
19 done without doing violence to your own individual judgment.

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1 position. However, no juror is required to surrender an honest
2 conviction as to the weight or the effect of evidence simply
3 because of the views of fellow jurors or for the mere purpose
4 of returning a verdict.

5 So, ladies and gentlemen, having said that to you,
6 I'm going to ask you to go back out. I'm going to ask you to
7 continue to discuss this case among yourselves to see whether
8 or not you can reach agreement in this case. All right?

9 Mr. Finney, will you take the jury out?

10 THE CLERK: Please rise.

11 (Jury out)

12 THE COURT: Counsel, anything further?

13 MR. WARREN: No, sir.

14 MR. LLORET: No, sir.

15 THE COURT: Okay. Well, we'll see what happens
16 between now and five o'clock.

17 MR. LLORET: Very well, Your Honor.

18 (Recess)

19 THE COURT: ...that they want to see or hear DC10.

20 MR. WARREN: Judge, I have the transcript here with
21 me. The session -- the session number, I don't believe the
22 Government has the actual conversation here. I think we're
23 going to have to play it for them tomorrow morning, or one of
24 the other options is if the Government -- and I only played
25 four pages of this. It wasn't the entire conversation. I

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1 think one of the other options is the Government could probably
2 burn the four pages worth of conversation that I played onto a
3 disk and we could give the jury the disk, whatever the Court
4 wants to do.

5 THE COURT: Well, can you do that, Mr. Lloret?

6 MR. LLORET: We can --

7 THE COURT: I mean not you.

8 MR. LLORET: Yeah. I'm accused by the staff of
9 always volunteering that we can do things, and then I found out
10 if we can really do it, but I think we can do this.

11 THE COURT: Okay.

12 MR. LLORET: So --

13 THE COURT: Well, then what I'll do is bring the jury
14 back. It's five o'clock. Tell them be back tomorrow and tell
15 them that we will arrange to have DC10 available for them to
16 listen to.

17 MR. LLORET: And, Your Honor, if that proves too
18 difficult, we obviously will have the computer here in the
19 morning. We can just play it to them.

20 MR. WARREN: And it's short, Judge. Like I said, it
21 was just four conversation that I played. I didn't play the
22 rest of the conversation. So I think it's what, three, four
23 minutes tops, something.

24 MR. LLORET: Yeah. I think we should be fine.

25 MR. WARREN: The Big Richard conversations.

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1 MR. LLORET: Yes.

2 THE COURT: All right.

3 MR. SMITH: Your Honor, that's going to be played for
4 them here or played for them back there?

5 THE COURT: Well --

6 MR. WARREN: You put it on disk --

7 THE COURT: -- they have -- if we can have a disk so
8 that they can take it back, we will let them do it back there.

9 MR. SMITH: Yeah. The only reason I asked,
10 Your Honor, with all due respect, I have to be -- I know I'm
11 here, but if there is somewhere I had to be tomorrow. I was
12 hoping that it would be back there and then come right over
13 here.

14 THE COURT: Well, let's solve that problem right now.
15 What -- Mr. Lloret --

16 MR. LLORET: Yes, Your Honor.

17 THE COURT: -- have you talked to your people? Do
18 you know whether you're going to be able to do this?

19 MR. LLORET: I don't know for certain, because I
20 haven't talked to the computer people, but we've done this --
21 things like this before, and I don't imagine it's a problem
22 unless I don't have a computer person there tonight to do it.
23 They're usually in at 9:00 in the morning. So it shouldn't
24 take very long to do.

25 THE COURT: Because the -- I'm concerned if Mr. Smith

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1 has got a commitment elsewhere. I can require him to be here
2 on the one hand. On the other hand, it may not be necessary,
3 and I just want to --

4 MR. LLORET: Well, Your Honor, why don't we say this,
5 Your Honor? I will call now, make sure that we can get this
6 done by 9:30 tomorrow morning, and I will advise chambers.
7 I'll advise Mr. Finney. He can then be in touch, or do you
8 want to have this resolved as we speak? I can make a call
9 right this moment.

10 THE COURT: Why don't you make the call now --

11 MR. LLORET: Okay.

12 THE COURT: -- and then we know whether Mr. Smith is
13 going to be here tomorrow morning.

14 MR. LLORET: Very good. Will Your Honor excuse me
15 for a moment?

16 MR. SMITH: Thank you. I appreciate that courtesy.

17 (Recess)

18 THE CLERK: Court is in session.

19 THE COURT: All right.

20 MR. LLORET: Yes, Your Honor. We -- we called back.
21 The computer folks are fine. They'll make the disk, and we'll
22 have it tomorrow morning whenever the Court directs. 9:15?

23 THE COURT: And it can go back with the jury --

24 MR. LLORET: Yes.

25 THE COURT: -- like the others?

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1 MR. LLORET: Yes, Your Honor. Same -- we'll put it
2 on a CD and they can put it back -- they can bring it back
3 there.

4 MR. WARREN: Probably going to be the only
5 conversation on the disk, I would imagine.

6 MR. LLORET: That will be correct.

7 MR. WARREN: Shouldn't be hard to find then, Judge.

8 MR. LLORET: Right.

9 THE COURT: Okay. Well, then we'll go ahead and do
10 it that way, and counsel, you are on call tomorrow, 15 minutes
11 again, except those of you from West Chester and New Jersey.

12 MR. LLORET: And, Your Honor, I'll just deliver that
13 disk to Mr. Finney tomorrow morning.

14 THE COURT: Yes. Deliver it to Mr. Finney.

15 MR. LLORET: And I'll copy it.

16 MR. WARREN: I have no objection if Mr. Finney
17 provides it to the jury without me being present or my client
18 being present, and I don't think any other counsel object
19 either, Judge.

20 COUNSEL: No.

21 COUNSEL: No.

22 THE COURT: All right. If there is no objection,
23 then you can give it to Mr. Finney, and Mr. Finney will give it
24 to the jury first thing in the morning.

25 MR. LLORET: Very well, Your Honor.

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1 THE COURT: Okay. Mr. Finney, you want to bring them
2 in?

3 (Pause)

4 THE CLERK: Please rise.

5 (Jury in)

6 THE COURT: Okay. Have a seat, ladies and gentlemen.
7 Ladies and gentlemen, it's five -- after five o'clock. So
8 we're going to recess. Before we do that, however, you have
9 sent a note out to me asking for exhibit DC10. We are going to
10 make arrangements to have that for you in the morning. When
11 you come back tomorrow morning, we will give it to you, and you
12 can play it in the jury room. Okay?

13 Now, I'm going to ask you to be back tomorrow at
14 9:15. Again, I want to caution you --

15 THE CLERK: Excuse me, Judge. Should I get the
16 alternates?

17 THE COURT: Are they in your chambers?

18 THE CLERK: Yes, they are.

19 THE COURT: In his chambers. Might as well have a
20 chambers.

21 (Pause)

22 THE CLERK: Please remain seated.

23 (Alternate Jurors Enter)

24 THE COURT: Okay. Ladies and gentlemen, I was saying
25 it's after 5:00. We're going to recess for the day. I'm going

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1 to ask everyone to be back tomorrow at 9:15 ready to go.

2 Again, I caution you, don't talk to anybody about
3 this case. Don't let anyone talk to you. Don't talk among
4 yourselves. Those 12 of you, wait until you get in the jury
5 room tomorrow morning at 9:15, and then you can begin your
6 deliberations.

7 Alternate jurors, you're cautioned not to discuss the
8 case among yourselves also. Okay?

9 Don't do any independent investigation. Maybe I
10 ought to put this on a disk. Don't read about it. Don't
11 listen to anything about this case. You are coming down the
12 home stretch. Live up to your oath. All right?

13 We will see you tomorrow at 9:15.

14 THE CLERK: Please rise.

15 (Jury out)

16 THE COURT: Okay. Have a seat, counsel. The
17 foreperson of the jury gave Mr. Finney a note before leaving.
18 "Can we please see the letter that Alton Coles wrote to Asya
19 from jail referencing the sales, dollars from the clubs?"

20 MR. WARREN: Government exhibit.

21 MR. LLORET: Yes, Your Honor. That's--

22 THE COURT: I'm trying to remember what number that
23 is.

24 MR. LLORET: It's 1200, Your Honor.

25 THE COURT: 1200?

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1 MR. LLORET: We'll -- we'll bring a copy in the
2 morning --

3 THE COURT: Okay.

4 MR. LLORET: -- to Mr. Finney.

5 THE COURT: Any problem, counsel, with sending that
6 out?

7 MR. WARREN: No, Judge. I think it can be delivered
8 in the same package along with the disk that has the
9 conversation on it. Sounds good to me --

10 THE COURT: All right.

11 MR. WARREN: -- unless, of course, counsel want to be
12 present when you hand it to them.

13 THE COURT: All right. No objection. That's what
14 we'll do. We'll send it out along with the disk.

15 MR. LLORET: Your Honor, Agent Armstrong indicates I
16 think that that letter is actually -- we put that into the
17 boxes, because that was one of the things that Agent Armstrong
18 had considered. So that may be back in the jury room already.

19 MR. BRESNICK: Just get another copy.

20 MR. LLORET: If Mr. -- we'll give them another copy.

21 THE COURT: If you have a copy --

22 MR. LLORET: Yes.

23 THE COURT: -- bring the copy over tomorrow.

24 MR. LLORET: That's fine.

25 THE COURT: Okay? All right. Gentlemen, we'll see

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1 you tomorrow.

2 MR. HARMELIN: Your Honor, you want counsel here at
3 9:30?

4 THE COURT: Yeah. 9:00 -- yeah.

5 MR. WARREN: No. 15 minutes notice except for you.

6 MR. HARMELIN: No. No. I was talking about --

7 THE COURT: You're on 15-minute call, and counsel
8 from West Chester and New Jersey, you can be here at ten
9 o'clock.

10 MR HARMELIN: 10:00. Great. Thank you, sir.

11 (Court Adjourned)

12 * * * * *

13 C E R T I F I C A T I O N

14 I, Maureen Emmons, court approved transcriber,
15 certify that the foregoing is a correct transcript from the
16 official electronic sound recording of the proceedings in the
17 above-entitled matter.

18

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Maureen Emmons

Date: 04/21/08

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